United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7097-7129

ORIGINAL

To be argued by
SIDNEY A. SCHWARTZ

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

RAYMOND INTERNATIONAL, INC.,

Plaintiff-Appellee,

against

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as PETER KIEWIT SONS' COMPANY and SLATTERY ASSOCIATES, INC., d/b/a PETER KIEWIT SONS' COMPANY-SLATTERY ASSOCIATES, INC.,

Defendant-Appellant.

PETER KIEWIT-SLATTERY (Joint Venture) sued herein as PETER KIEWIT SONS' COMPANY and SLATTERY ASSOCIATES, INC., d/b/a PETER KIEWIT SONS' COMPANY-SLATTERY ASSOCIATES, INC.,

Third-Party Plaintiff-Appellee,

against

BAYSHORE CONCRETE PRODUCTS COMPANY,

Third-Party Defendant-Appellant.

BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES

MISCELLANEOUS

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Preliminary Statement

The plaintiff, Raymond International, Inc. ("Raymond"), brought suit against the defendants, Peter Kiewit Sons' Company and Slattery Associates, Inc., d/b/a Peter Kiewit Sons' Company-Slattery Associates, Inc. (Joint Venture) ("Kiewit"), alleging negligence in that Kiewit provided in-

adequate and improper fittings and devices and were further negligent in direction and supervision of the operation. In addition, Raymond charges Kiewit with breach of express, implied warranties and indemnification under a provision of a contract.

Raymond brought a direct action against Bayshore Concrete Products Company ("Bayshore"), alleging negligence and breach of an implied warranty of fitness for use. Kiewit brought a third-party action against Bayshore alleging breach of contract, breach of an implied warranty of fitness for use and indemnification under a certain contract.

This case, an admiralty action, was tried non-jury before the Honorable Judge Constance Baker Motley on June 5, 6, 7 and 10, 1974.

Judge Motley in her Conclusions of Fact and Law decided that Kiewit was liable to Raymond in the amount of $30,200 and that Bayshore was liable to Raymond in the same amount. In addition, Judge Motley found that Bayshore was liable to Raymond for an additional $44,386.22 representing extra expenses as a result of the liability alleged.

Judgment was entered on Jan. 14, 1976, a notice of appeal was filed by Kiewit on 2/13/1976 and by Bayshore on 2/27/76.

Statement of Facts

Prior to April 28, 1970, Kiewit was engaged in the construction and erection of the Cross Bay bridge in Jamaica Bay, New York. For the purposes of the bridge's construction Kiewit contracted with Bayshore (499)* for

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* Numerals in parentheses, preceded by the letter A refer to pages in the appendix; other numerals refer to pages in the transcript.

prestressed concrete beams, referred to as T beams. The T beams were approximately 130 feet long, several feet thick and weighed 130 tons (2, 3). Kiewit was to take possession of the T beams at Bayshore's production facility located at Cape Charles, Virginia. At Cape Charles the beams were loaded onto scows or barges under the direction of Kiewit's agent, U.S. Salvage (399). The T beams were loaded onto the barge by use of a hydraulic "dolly" (401). The lifting pads imbedded in the T beams were necessary for Bayshore to complete its contract. After loading the T beams on the barge they were secured by personnel of Kiewit for transportation. After the loading of the T beams Bayshore had no further participation in the events underlying the present lawsuit.

Kiewit in order to lift the T beams from the barges, which had been towed from Virginia to New York, contracted with Raymond for Raymond to supply a floating "A" frame derrick known as the Century (493). The Century's A frame derrick had falls or wires used for hoisting.

The procedure used was for the falls to be attached to a steel beam approximately 130 feet long (3) with four lifting arms attached to the beam, two at each end. These lifting arms were in turn attached to wire pads embedded in each end of the concrete T beam. The arms of the steel beam were attached to the pads in the T beam by personnel of Kiewit. Prior to April 28, 1970, some 200 beams had been unloaded without incident (544). On April 28, 1970, two T beams had been unloaded. The third T beam was being unloaded when one of the wire pads attached to the T beam snapped. Immediately thereafter, the remaining three wire pads snapped. This resulted in the steel beam, which was under tension, snapping back and striking the Century, causing the damage alleged by the plaintiff (162-164).

Under Raymond's contract with Kiewit, Kiewit was to furnish any and all special fittings, lifting devices, strong-

backs and slings required for hooking on to and hoisting within direct reach of the derrick's tackle (495).

Kiewit's contract with Bayshore specifically excluded lifting loops, known as bearing pads, bearing assemblies and teflon materials (503).

The lifting loops or lifting pads were placed into the concrete T beams for Bayshore's use in moving the T beams around its own yard prior to their delivery. Each T beam was, in fact, moved at least twice and sometimes three times by Bayshore at its own assembly yard (407).

Kiewit in its third party complaint alleged that Bayshore was to supply the lifting straps and/or the lifting hooks (A 13). This allegation was specifically denied by Bayshore (A 21). The record contains no evidence that the lifting pads used by Kiewit were ordered from Bayshore. Contrarily, the attorney for Kiewit in response to a question by the Court stated:

> "The Court: Well, let me ask you about these hooks that were built into the steel girders by the manufacturer. Were they put there at your specification?
>
> Mr. Lysaght: This I couldn't answer at the present time, Your Honor. They were ordered from that particular contractor, Bayshore.
>
> The Court: The hooks were ordered placed in the beams by your company?
>
> Mr. Lysaght: Well, the girders were ordered from them, your Honor. As far as who put them in there, I couldn't tell you. I know that Bayshore put them in.
>
> The Court: Well, the question is, were they put in at your direction to operate in connection with the steel beams?
>
> Mr. Lysaght: No, ma'am, I think they were already in there. I think that Bayshore had them in there for their own devices as well, because they had to move these beams around their own yard.
>
> The Court: So they are generally a part of the beam itself so it could be lifted.

> Mr. Lysaght: I hesitate to give you an unqualified answer to that, ma'am, but it is my understanding that that is the case (118, 119).

The lifting pads were not required under Bayshore's contract and the fact that Kiewit chose to use them does not make Bayshore liable to Kiewit or Raymond.

Kiewit also sought and was granted indemnification against Bayshore under what it claimed to be an indemnification clause in the contract. The pertinent section of the contract, however, states that Bayshore will be liable only "on account of any act of omission of the seller" (501).

The Court below, in its Conclusions of Law and Fact, held that the lifting hooks broke as a result of a defect in manufacture, that Bayshore was liable to Kiewit under the indemnification provision of the contract and that Bayshore was liable to both Raymond and Kiewit for breach of implied warranty of fitness for use.

Kiewit also requested additional damages from Bayshore on the grounds that after the accident they were forced to use different methods of lifting the T beams. The Court below granted these additional damages to Kiewit.

There was testimony that after the accident of April 28, 1970, the remaining T beams on the barge were examined and it was discovered that the loops had rusted down to and below the concrete T beam (168-170).

The Court below granted Kiewit the additional expenses for handling on the grounds that the discovery of the rust forced them to use alternative means of hoisting (555-557) and that this represented recoverable consequential damages.

Questions Presented

1. Was this the type of action contemplated by the judicial expansion of strict liability?

2. Did Bayshore breach its implied warranty of fitness for use with regard to pads which were not sold to either Raymond or Kiewit?

3. Was Bayshore liable to Kiewit under the indemnity provisions of the contract?

4. Was Bayshore liable to Kiewit for the extra expenses incurred?

POINT I

This is not the type of action contemplated by the expanded judicial concepts of strict liability or the abolition of privity.

This is an action between three corporations arising out of an alleged defective lifting pad. Both Raymond and Kiewit are corporations with expertise in their particular fields and with access to competent counsel who prepared the contract in this case. There was a specific contract between Raymond and Kiewit and there was a contract between Kiewit and Bayshore. These contracts spell out in detail the obligations of the parties to each other. This is not a case where a manufacturer has put into the stream of commerce a mass produced article generally available to the public, such as an automobile or a commonly used drug.

The purpose of the expanded concept of strict liability is not a single recovery for a single act between individual parties but is to protect the public in general and to force

a manufacturer to take greater precaution in the production and distribution of his product. As one commentator has aptly stated:

> "Unlike the implied warranty of safety, strict liability goes beyond control and point of injury. The rationale is directed beyond conduct. The focus is on the product, a product which probably remains on the market subsequent to the particular injury. The particular product and others like it may still be on the market at the time of trial. Since one of the goals of strict products liability is to eliminate recurrent risk-generators, without requiring proof of fault, the concept of defect must retain the capacity of movement in time . . ."[1]

The above quotation and many similar to it hold that one of the rationales of strict liability was the protection of the general public and the distribution of the risk of injury to the public as a cost of doing business.

> "The economic justification, which has come to be known as enterprise liability, was to assure that manufacturers bear the cost of injuries resulting from their defective products, distributing the risk of injury to the public as a cost of doing business. Such a justification is, however, far more than a mere economic modification; it is a means of social control by which one necessarily conditions the efforts of manufacturers and others against whom enterprise liability is applicable. He who created the danger, and who has the better capacity and expertise to control it, is thus encouraged toward the protection of human health and life by safety in design and production, lest his prod-

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[1] Adler, *Strict Products Liability, The Implied Warranty of Safety, and Negligence, with Hindsight, as Test of Defect.* 2 Hofstra Law Rev. P. 581, 587, hereinafter cited as Adler.

uct become uneconomic and uncompetitive by virtue of increased costs."[2]

The Court in its findings of fact and conclusions of law has cited *Goldberg* v. *Kollsman Instrument Corporation,* 12 N.Y. 2d 592. If this case was cited merely for the proposition that generally a non-contracting party may bring a cause of action for breach of warranty, there is no dispute as to this issue of law. However, if it is cited for the proposition that this particular case is governed by *Goldberg,* it is improperly analyzed. *Goldberg,* in abolishing the rule of privity and expanding a manufacturer's liability, clearly stated its rationale.

> "Today, we know from Greenberg v. Lorenz; Randy Knitwear Inc. v. American Cyanamid Co. (supra) and many another decisions in this and other States (see, for instance, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 68, 75 A.L.R. 2d 1, and Thomas v. Leary, 15 A.D. 2d 438, 225 N.Y.S. 2d 137) that, at least where an article is of such a character that when used for the purpose for which it is made it is likely to be a source of *danger to several or many people* if not properly designed and fashioned, the manufacturer as well as the vendor is liable, for breach of law-implied warranties, to the persons whose use is contemplated." (Emphasis added)

It is clear from reading *Goldberg* that the purpose was to protect the general public from a source of danger, not a single party who has entered into a specific contract, and may adequately protect himself from breach.

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[2] Adler, at p. 583; "[T]he strong concern for public safety supporting the result in *Codling* may well disappear when the loss is merely economic, causing future Courts to be less enamoured of non-purchaser recovery in such cases."
Watkins, *The Apparent Demise of Privity in Breach of Warranty Actions,* 38 Albany Law Rev. 3, 10.

POINT II

Bayshore did not breach its implied warranty of fitness for use to either Raymond or Kiewit.

The Court, in finding that Bayshore had breached its warranty to Raymond and Kiewit, based its decision on the fact that the lifting pads broke and were therefore defective. During the course of trial these lifting loops were referred to under several different names. However, Kiewit's witness, Mr. Freelund, correctly described the loops as lifting pads (226).

The contract between Raymond and Kiewit required Kiewit to supply all lifting devices, straps and slings. Kiewit's contract with Bayshore required only the manufacture of the concrete T beams. *It specifically excluded lifting pads* (503). The fact that Kiewit may have for its own purposes retained the lifting pads that Bayshore had embedded into the concrete for *Bayshore's* own use does not create a sale of these lifting pads from Bayshore to Kiewit for the purpose to which Kiewit used the same. The admission of its counsel, set forth at page 4 hereof, shows the non-liability of Bayshore on that subject.

The Court in its findings of fact and conclusions of law relied on *Restatement of Torts 2d,* Section 402(a). This section is inapplicable to the present cause of action, since Bayshore did not sell the alleged instrumentality of harm, i.e., the lifting pads. The section clearly states that the defendant must be a seller engaged in the business of selling the product in issue. Illustrative of this concept is Comment L to Section 402(a) and the illustration used:

> "1. A manufactures and packs a can of beans, which he sells to B, a wholesaler. B sells the beans to C, a jobber, who resells it to D, a retail grocer. E buys the can of beans from D, and gives it to F. F serves the beans at lunch to G, his guest. While eating the beans, G breaks a tooth, on a pebble of the size, shape and

> color of a bean, which no reasonable inspection could possibly have discovered. There is satisfactory evidence that the pebble was in the can of beans when it was opened. Although there is no negligence on the part of A, B, C, or D, each of them is subject to liability to G. On the other hand E and F, who have not sold the beans, are not liable to G in the absence of some negligence on their part."

The illustration clearly demonstrates that if one is not a seller he cannot be held liable to the injured party.

Since, Bayshore did not sell or intentionally supply the lifting pads to Kiewit for the purpose to which they were put, it cannot be held liable. There is no proof that Raymond and Kiewit were the intended users of the lifting pad, nor is there any evidence that Bayshore had a reasonable expectation that the lifting pads would be used. *Coddling* v. *Paglia,* 32 N.Y. 2d 330, 345 N.Y.S. 2d 461.

> "If the injury-causing use was neither intended nor reasonably foreseeable, the product would simply not be defective."[3]

The Court in its findings of fact and conclusions of law decided that the wires in the lifting pads had been improperly woven (548). In relying on the testimony and reports of Mr. Silkiss (515-538), the Court decided that "the lifts broke due to improper design probably aggravated by the rusting." The Court quoted and apparently relied on the use of the term "home made" as the basis for finding an improper design and therefore a defect in the lifting pad.

A further reading of Mr. Silkiss' testimony clearly indicates that his use of the term "home made" merely meant that the lifting pads did not meet the standards for wire lines or ropes normally used for hoisting (385, 386).

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[3] Adler, p. 592.

Bayshore put in the lifting pads, which were fit for Bayshore's own purposes (118, 119). They were not designed as wire lines or ropes for *all* hoisting purposes, but only for Bayshore's own use, a use to which the lifting pads had been put to at least twice and occasionally three times (407).

On April 28, 1970 the T-beams were in possession and control of Raymond and Kiewit. Under these circumstances the mere happening of the accident does not prove a defect in the product.

> "If, however, the instrumentality is of the sort that must be manipulated in some fashion by the user then, in addition to direct proof of a malfunction, the user ought also to supply direct proof of the defect causing the malfunction."[4]

This burden was not met by either Raymond or Kiewit.

POINT III

Bayshore is not liable to Kiewit under the indemnity provision of its contract.

The Court in its conclusions of law and findings of fact held Bayshore liable to Kiewit under an alleged indemnity provision, contained in Paragraph 8 of the contract (501). The Court, however, misquoted the contract by stating that Bayshore would be responsible for "suits arising from any act *or* omission of the seller" (emphasis added). The contract itself provides that Bayshore would be responsible to Kiewit but only for "suits arising from any act *of* omission of the seller". (Emphasis added)

Since Bayshore was not obligated under the contract to supply the lifting pads, nor did they supply the lifting pads to Kiewit for the purpose to which they were put, it

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[4] Barker, *Circumstantial Evidence in Strict Liability Cases*, 38 Albany Law Review, 11, 17.

follows as a matter of law that Bayshore did not commit an act of omission which would bring the contract of indemnity into being.

For a contract to indemnify a party (Kiewit) for its own negligence, there must be such an intention expressed in unequivocal terms. *Margolin* v. *New York Life Ins. Co.*, 32 N.Y. 2d 154, 344 N.Y.S. 2d 336, *Kurek* v. *Port Chester Housing Auth.*, 18 N.Y. 2d 450, 276 N.Y.S. 2d 612, *Levine* v. *Shell Oil Co.*, 28 N.Y. 2d 205, 321 N.Y.S. 2d 81.

This is not such a contract.

Nor is it a contract by which Bayshore agreed to indemnify Kiewit for the liability it agreed to in its contract with Raymond. This is *not* the type of contract which was before the Court in *General Electric Co.* v. *Hatzel* v. *Buehler Inc.*, 19 A.D. 2d 40, 240 N.Y. 2d 636, aff'd. 14 N.Y.2d 639, 249 N.Y.S. 2d 425, in which an indemnitee's liability under contract with another was *assumed* by the indemnitor in the cited case.

Not only did the contract in the case *sub judice* not provide indemnity to Kiewit for its own negligence but it certainly did not provide indemnity to Kiewit for any indemnity it gave to Raymond.

POINT IV

Bayshore is not liable to Kiewit for the extra expenses incurred after the accident.

It was Kiewit's contention that after the accident of April 28, 1970, they inspected several of the T-beams and found rust on the lifting pads below the concrete. The Court in awarding the additional damages to Kiewit stated that it was basing these damages on the fact that Kiewit had reasonable grounds to change the method of lifting after the accident of April 28, 1970 and the discovery of rust.

Bayshore under its contract with Kiewit was not to supply the lifting pads. Kiewit chose, on its own, to use the lifting pads that Bayshore had embedded in the concrete for Bayshore's purposes. Kiewit in its contract with Raymond was to supply all lifting devices, straps and slings. Kiewit in an apparent attempt to save money chose to use Bayshore's lifting pads. Had Kiewit properly performed its contract with Raymond it would have provided its own lifting device and slings from the beginning of the operation until its termination. Over 200 T-beams were lifted during the course of this project. Certainly had Kiewit supplied its own lifting devices their costs would have been greatly increased. Therefore, when Kiewit changed its method of lifting the T-beams it did not incur an additional expense but merely began assuming an expense that it was obligated to assume from the beginning of the project.

Neither *Mayes Company* v. *State,* 18 N.Y. 2d 549, 277 N.Y.S. 2d 393, nor *L. I. Lighting Co.* v. *City of Glen Cove,* 64 Misc. 2d 768, 315 N.Y.S. 2d 656, cited by the Court below in awarding "additional" costs to Kiewit against Bayshore, speak to the question of the liability under the facts, disclosed by this record, of Bayshore to Kiewit for the "additional" costs.

These "additional" costs, as aforesaid, were only made necessary by Kiewit having improperly used the lifting pads as a means of saving operational costs *from the very beginning.* They did not come into being as a result of the accident. These certainly are not consequential damages which were in the contemplation of the parties, if it were to be assumed that these lifting pads were furnished by Bayshore to Kiewit for the purpose for which the latter used the same during the operation which has been outlined hereinbefore. The very decision of *Long Island Lighting Co.* v. *City of Glen Cove, supra,* spells out the "special" circumstances which were in the contemplation and knowledge of the contracting parties at the time of

the making of the contract *there* involved. Assuming *arguendo,* that the lifting pads were furnished by Bayshore to Kiewit for the purpose for which the latter used the same, which is denied, there were no "special" circumstances in the contemplation or to the knowledge of Kiewit and Bayshore which would make these additional costs items of recovery in this litigation. They were not in any sense of the word consequential damages which flowed directly from any alleged breach of contract.

Since the findings of fact and conclusions of law of the Court on this subject, along with the subjects to which the appellant has addressed itself heretofore, are not within the aegis of the "clearly erroneous" rule on an appeal in a non-jury or admiralty action, this Court in searching the record can reverse those findings. Certainly the finding as to the liability of Bayshore to Kiewit for these "additional" costs is not supported by the record.

CONCLUSION

The judgment of the Court below against the appellant should be reversed in all respects to which ends this brief is

Respectfully submitted,

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